



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2004-3920

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201544.

The Texas Department of Transportation (the "department") received four requests for certain correspondence related to specified projects. You claim that the requested information is excepted from disclosure under sections 552.103, 552.104, and 552.110 of the Government Code. Additionally, you have notified interested third parties A. H. Beck Foundation Co., A.L. Helmcamp, Inc., Pavers Supply Company, Rosiek Construction Co., Inc., Silva Contracting Co., Texas Sterling Construction, L.P., and W. T. Byler Co., L.P. of the requests for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Chapter 552 of Government Code in certain circumstances). We received correspondence from Rosiek Construction Co., Silva Contracting Co., and Texas Sterling Construction, L.P.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹This ruling only addresses the information submitted by the department as responsive to the instant request for information. *See* Gov't Code § 552.301(e)(1)(D).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

We understand you to represent that the information at issue consists of financial information of contractors submitted to the department pursuant to the department's program for pre-qualification of bidders on construction contracts. You explain that the contractors who bid on these contracts repeatedly compete with each other as bids are sought. You assert that release of the information would impair the department's "ability to compete for contractors with entities that do not have to release private financial information" and would, in effect, reduce competition on competitive bids. Finally, you explain that if the financial information is released to competitors, it would give those competitors "a significant and unfair advantage" in that those competitors could use the financial information to effectively destroy competition. Upon review of your arguments and the submitted information, we find that you have demonstrated that public release of the information at issue would cause specific harm to the department's interests in particular competitive bidding situations. Accordingly, the department may withhold the submitted information under section 552.104 of the Government Code. As our ruling on this issue is dispositive, we need not address the remaining submitted arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 201544

Enc: Submitted documents

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